In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-33

CALVIN WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having conspired to transfer narcotics not pursuant to a written order form, in violation of 26 U.S.C. (1964 ed.) 4705(a) and 7237(b). Petitioner was sentenced to eight years' imprisonment. The court of appeals affirmed without opinion (Pet. App. A).

The evidence showed that petitioner supplied narcotics to one Robert Roseboro, a co-defendent who had pleaded guilty.[1] Narcotics agents purchased $30,000 worth of heroin and cocaine from Roseboro in October and December 1970 (Tr. 65-71, 75-93, 199-202, 239-240, 546). A court-authorized wiretap of Roseboro's telephone disclosed six conversations with an individual who identified himself as "Calvin." The conversations related to the purchase of narcotics; in three of the conversations Roseboro and "Calvin" agreed to meet at a specific time. After each of these conversations, Roseboro or his courier (Richard English) met with petitioner at the time agreed upon in the overheard conversations (Tr. 144-147, 166-174, 176-179, 219-221, 517-520).

1. Petitioner contends that the jury could not convict him of conspiracy to transfer narcotics and at the same time acquit Kowlessar and McNeil, the only co-defendants tried with him. But petitioner was indicted for conspiring with English and Roseboro as well as with Kowlessar and McNeil to transfer narcotics,[2] and the evidence overwhelmingly established that petitioner, Roseboro and English conspired to sell narcotics to a federal agent. Roseboro had already pleaded guilty to the charge; English was a

---

[1] Co-defendant Richard English, Roseboro's courier, was a fugitive at the time of trial. Co-defendants Lolita Kowlessar and Connie McNeil were tried with petitioner on the conspiracy charge and were acquitted.

[2] We are lodging a copy of the indictment with the Clerk of this Court.

fugitive at the time of trial. Under these circumstances, the fact that Kowlessar and McNeil were acquitted does not require petitioner's conviction for conspiracy to be set aside. See *United States* v. *Marquez*, 424 F.2d 236, 239-240 (C.A. 2), certiorari denied, 400 U.S. 828.[3] Petitioner's reliance on *United States* v. *Masiello*, 445 F. 2d 1324 (C.A. 2) is misplaced (Pet. 9, 12). Contrary to petitioner's assertion (Pet. 12), there is nothing in the opinion which suggests that two of the three defendants actually on trial have to be found guilty to sustain a conspiracy conviction.

2. Petitioner argues that the indictment was defective because it did not contain the name of the buyer and because the proof at trial showed a conspiracy during October and December 1970, where-

---

[3] Petitioner's contention (Pet. 9-10) that the court prevented the jury from finding there was no conspiracy is not borne out by the record. The trial judge never told the jury that a conspiracy existed between Roseboro and English. Rather he told the jury, without objection, that Roseboro and English were involved in a narcotics conspiracy "if you believe the government's evidence" (Tr. 779), "if you accept the government's evidence" (Tr. 885). The judge properly charged the jury to consider each defendant separately and to acquit petitioner unless the jurors first found the existence of a conspiracy and then determined that petitioner was a member of the conspiracy (Tr. 771-778). Petitioner's somewhat contradictory claim, that the trial judge "forbade the jury to consider [the activities of] Roseboro or English" in determining whether a conspiracy existed between those two and petitioner (Pet. 8), is also without merit and is refuted by the very portions of the charge about which he complains (Pet. 10).

as the indictment charged a conspiracy from January 1970 to April 1971. But an indictment charging a conspiracy is not subject to dismissal when the proof establishes the existence of a conspiracy for a substantial portion of the period of time charged in the indictment. *United States* v. *Postma*, 242 F. 2d 488, 496 (C.A. 2), certiorari denied, 354 U.S. 922. Here, the proof showed a conspiracy between Roseboro and English to sell narcotics commencing in October, 1970, and lasting at least until the middle of December, with petitioner joining it no later than the beginning of December. In the absence of any claim of prejudice to petitioner's defense, the variance is immaterial. *United States* v. *Postma*, *supra*.[4] Furthermore, an indictment charging a conspiracy to transfer narcotics need not contain the name of the prospective purchaser. Particulars of that kind can be obtained through pre-trial discovery. The only case cited by petitioner, *Lauer* v. *United States*, 320 F. 2d 187 (C.A. 7), certiorari denied, 368 U.S. 818, was expressly overruled in *Collins* v. *Markley*, 346 F. 2d 230 (C.A. 7, *en banc*), certiorari denied, 382 U.S. 946. In any event, the substantive counts in the indictment contained the purchaser's name; accordingly petitioner was in no way surprised or prejudiced in his defense at trial.

---

[4] Each of the overt acts charged in the indictment was alleged to have taken place in December, 1970. Petitioner's claim, that the trial judge permitted "the jury to consider conspiratorial conduct for a period of two months after the arrests took place * * * in * * * February 1971" (Pet. 15), is unencumbered by a reference to the record and is not otherwise explained.

3. Petitioner alleges that the government failed to prove that the conspirators contemplated dealing in narcotics other than pursuant to the required order form. The law is clear that if an agreement to distribute heroin exists at all, the fact that the transfers are made clandestinely justifies an inference that order forms are not demanded of the buyer. *United States* v. *Vasquez*, 429 F. 2d 615, 618-619 (C.A. 2); *United States* v. *Butler*, 446 F. 2d 975 (C.A. 10). The evidence in this case of guarded telephone conversations, utilization of code phrases, reference to police surveillance, and secretive movements and meetings resulting in delivery of large amounts of heroin in hotel rooms, clearly establish the illicit purpose and design of the conspiracy, and formed the basis for an inference that the order form requirement was ignored.

4. Petitioner's final claim, that the evidence failed to establish that petitioner was the same "Calvin" overheard on the wiretapped conversations, is also unpersuasive. It is well settled that voice identification may be proved other than by direct evidence. See, *e.g.*, *United States* v. *Fassoulis*, 445 F. 2d 13 (C.A. 2), certiorari denied, 404 U.S. 858, and cases cited therein. Here, the evidence of petitioner's meetings with Roseboro on the three occasions following "Calvin's" conversations with Roseboro clearly showed that petitioner Calvin Williams and "Calvin" were one and the same person. While petitioner's "expert" witness testified that he had substantial doubt that the voice on the tapes was that of petitioner, he ad-

mitted that his conclusion was based not upon any scientific process but simply on listening to the tapes (Tr. 581-89). The decision as to the weight to be given this testimony was for the jury. *United States* v. *Kelly*, 420 F. 2d 26, 28-29 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 474910 99